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Supreme Court of the United States

IN THE

October Term, 1958

UNIVERSE TANKSHIPS, INC.,

Petitioner,

v.

ASTON BARTHOLOMEW,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Statement

On April 15, 1952, the plaintiff was assaulted by a fellow seaman while working aboard the defendant's vessel. The plaintiff brought an action against the defendant for negligence under the Jones Act and an action for unseaworthiness, under the General Maritime Law of Liberia which is the same as the General Maritime Law of the United States.

The plaintiff is a citizen of the British West Indies, the defendant shipowner is a Liberian corporation and the defendant's ship is registered under and flies the flag of Liberia.

In addition, the following factors or contacts with the United States were either conceded by the defendant, undisputed or found by the Court to be present which compelled application of the Jones Act.

Facts Bearing on Real Corporate Ownership and Control Which Were Conceded by the Defendant

(1) All of the stock of the defendant is owned by the Oceanic Steamship, a Panamanian Corporation.

(2) The stock of Oceanic Steamship is owned 100% by American citizens.

(3) All of the officers of the defendant are American citizens.

(4) The principal place of business of the defendant is in New York City.

(5) The only office of the defendant corporation in Liberia is a statutory office.

The Place of Occurrence

(6) The occurrence happened in American waters somewhere in the Chesapeake Bay.

Facts Pertaining to Shipping Article Signed by the Plaintiff

(7) In 1950 the defendant brought the plaintiff to this Country in order to sign the plaintiff on one of its ships.

(8) The defendant brought the plaintiff to New York and paid his fare to Baltimore where he signed on.

(9) The articles for the trip on which the plaintiff was hurt were also signed in Baltimore and were for service on defendant's ship for a period not exceeding 12 months.

(10) The articles were signed for trips to foreign ports and return to a port of discharge in the United States.

(11) This pertinent voyage commenced in Baltimore and ended in Philadelphia.

(12) There is a provision in the Articles which says that a crew member may be transferred to any other vessel operated by the same line or owners.

(13) There is nothing in the articles which state that the rights of the crew in the event of an accident or injury by negligence or otherwise are governed by Liberian law.

Facts Pertaining to the Domicile of the Plaintiff

(14) The plaintiff has been in this country ever since being brought here by the defendant in 1950.

(15) During all this time, he lived some place in Brooklyn, and still lives in Brooklyn.

(16) The plaintiff intended to make the United States his permanent home and brought all his personal effects and all his belongings with him to Brooklyn, and did not have any other belongings anywhere else.

(17) Before this occurrence, the plaintiff made 2 voyages aboard other vessels owned by the defendant.

(18) When he left the service of the defendant before this occurrence, he went to work for Macy's and another concern for about 1 year.

(19) The defendant had a bank account in Brooklyn where he deposited his money prior to this occurrence.

(20) Approximately 3 months after the occurrence and before a claim or suit was started, the plaintiff left the country for about 2 weeks for the purpose of getting a visa so he could properly apply for United States citizenship.

(21) That after making this trip the plaintiff signed a declaration to become a United States citizen.

The Court found that it was proper to apply the Jones Act in view of the presence of all these factors in this case. On this issue the Court of Appeals stated as follows:

> "That the factors or contacts just discussed are in the aggregate substantial is clear beyond peradventure of doubt. No other conclusion is rationally admissible in the light of the decided cases."

The cause of action for unseaworthiness was submitted to the jury together with the cause of action for negligence under the theory of "pendent jurisdiction". The jury brought in a verdict in favor of the plaintiff on both causes of action.

The petitioner contends that the application of the Jones Act was not warranted and that the cause of action for unseaworthiness should have been tried by the Court and not submitted to the jury.

REASONS FOR DENYING WRIT

1. The court below did not disregard any traditional, settled or established choice of law principles nor did it create a "new formula" in total disregard of any traditional choice of law techniques in determining that the Jones Act applies under the circumstances in this case.

The opinion of the court below does not conflict nor is it in any way inconsistent with the holdings of this Court either in *Lauritzen v. Larsen*, 345 U. S. 571, or in *Romero* v. *International Terminal Operating Co., et al.*, decided February 24, 1959 .... U. S. ..... The court below fully considered and completely followed the directions as set forth by this court in the *Lauritzen* case. This can readily be seen by reading the said opinion which can be found in the appendix of the petitioner's brief.

The petitioner has taken statements made by the Court below and has put them together completely out of context. The petitioner has also completely distorted and misinterpreted the holdings of the court below and the holdings of this court in the *Lauritzen* and *Romero* cases. Any inconsistencies between the holdings in these cases is created solely by the misconceptions of the petitioner.

The court below did not hold as petitioner contends that, "since the considerations" stated in the *Lauritzen* case for valuing and weighing jurisdictional factors were vague and of undefined direction "therefore" traditional choice of law techniques could be disregarded. The Court below did say in its opinion as follows:

> "To begin with as pointed out in *Lauritzen* at page 578, 'we are simply dealing with a problem of statutory construction'. For this reason traditional choice of law techniques may be more misleading than helpful."

There is nothing incorrect about this statement since in this instance there is no doubt that the court below had in mind such traditional choice of law techniques as "the place of the wrongful act" and "the place of the making of the contract." These factors are usually of great importance for choice of law purposes in municipal cases. However this court has held such factors to be largely fortuitous in most cases involving marine torts and therefor of little importance for choice of law purposes in this type of case.

The petitioner interprets this statement by the court below as holding that traditional choice of law principles should be totally disregarded. Nowhere does the court below reject or authorize the rejection of traditional choice of law principles or techniques. Nor can it be interpreted as holding by the widest stretch of the imagination that traditional choice of law principles should be disregarded. The true fact is that the court below did not disregard or fail to consider any such principles or techniques. Nor did it substitute its own choice of law technique in total disregard thereof.

The Court below did not as petitioner contends, create a "new formula" which would permit any foreign seaman serving on any foreign flag vessel to recover under the Jones Act. Clearly, the restatement by the court below of the method of approach and the principles to be applied in Jones Act cases after making a thorough and exhaustive study of the numerous cases in point was not a total disregard for the old and the creation of a "new formula." On the contrary, the purpose was to clarify in order to better follow and to help courts in the future to better follow the general, vague and undefined directions of this court in the *Lauritzen* case.

The petitioner has no cause for complaint as the court below concluded that before the Jones Act can be applied

"substantial" contacts with the United States must be present. Surely this test does not permit any foreign seaman serving on any foreign flag vessel to recover under the Jones Act.

The petitioner talks about "traditional choice of law principles which this country has adopted as settled doctrine in matters involving the interests of foreign nations", "traditional choice of law techniques which are consonant with the usual doctrines and practices with maritime law", "factors which under settled American doctrine are acceptable for choice of law purposes" and "established choice of law principles".

Specifically what does the petitioner mean when he uses these general terms? What traditional, settled or established choice of law principles does the petitioner claim the Court below disregarded? What is the "new formula" that the petitioner contends was substituted by the Court below and how does it differ from the old formula? The petitioner makes use of these general terms because if he were specific, he could not point to any material factors that were disregarded or to any "new formula" that was created by the Court below which conflicts or is inconsistent with the directions of this Court.

The petitioner in effect is really contending that the only relevant factor to be considered is the "law of the flag" and any other factors present no matter how numerous or substantial cannot outweigh it. The opinion in the *Lauritzen* case did not reject or repudiate all earlier cases holding to the contrary. It only decided that the contacts present in that case were not substantial enough to warrant the application of the Jones Act. In this respect the court in *Lauritzen* stated on page 586 as follows:

> "* * * in this case it (the law of the flag) must prevail unless some heavy counter weight appears."

2. The place of the wrongful act is a relevant factor which can not be ignored in determining choice of law even though in a particular case this factor may be weighed and evaluated as having no significance or very slight significance.

It was not error for the Court below to state as follows:

> "We start with the fact that the assault occurred in the territorial waters of the United States. This is undoubtedly a factor of significance, see *Lauritzen* at page 583".

The Court below did not state it was giving "the place of the occurrence" great significance. It did not state how much value or weight it was giving the place of the occurrence. It merely stated that "undoubtedly this was a factor of significance". This statement by the Court below is not erroneous and does not conflict with the decisions of this Court in the *Lauritzen* or the *Romero* cases.

Neither the *Lauritzen* nor the *Romero* case stands for the proposition that the place of the wrongful act is irrelevant and should no longer be considered in the future in weighing or evaluating the points of contact present with the United States for choice of law purposes in Jones Act cases. This factor is not irrelevant. It cannot be excluded from consideration just because in most cases the place of the accident may be largely fortuitous and therefore given slight importance or deemed insufficient, when standing alone, to warrant the application of the Jones Act in a given case under the limited facts in that particular case.

In some cases it is possible that "the place of the occurrence" is not largely fortuitous. As a result this

factor may vary in importance from case to case when considered with the other factors present.

In this case the principal place of business of the defendant was in the United States and the vessel started and ended all its trips in American ports. This was not fortuitous but by the deliberate free will and choice of the defendant. The chance of accidents occurring in American waters was therefore largely increased because of the increased frequency and length of time defendant's vessel would necessarily have to be in American waters.

The court below cannot be criticized for noting this factor. In the *Romero* case this court stated that the place of contracting is largely fortuitous and of little importance in determining the applicable law in an action of marine tort and yet it still took the trouble to note the fact that— "unlike the contract in *Lauritzen*, Romero's agreement of hire was entered into in Spain." And in the *Lauritzen* case this court took great pains not to overlook any and all possible relevant factors, taken either separately or in combination with each other, that would have a bearing on the choice of law to be applied. In this regard the court in *Lauritzen* stated on page 583 as follows:

> "We therefore review the several factors which alone or in combination are generally conceded to influence choice of law to govern a tort claim particularly a maritime tort claim, and the weight and significance accorded them."

3. The identity of the foreign corporation was not merged with that of its stockholders nor was the corporate entity of the defendant corporation disregarded.

The Court did not disregard the corporate entity to impose liability on the stockholders. It merely looked

through the facade of foreign registration and incorporation to the American ownership behind it. It then treated this foreign corporation as if it were an American corporation in order to prevent the American ship owners from evading their obligations under our laws.

This practice in this type of case is now well established. *Gerradin* v. *United Fruit Co.*, 2 Cir. 132, 60 F. 2d 927; *Carroll* v. *United States*, 2 Cir. 1943, 133 F. 2d 690; *Zielinski* v. *Empressa Hondurena De Vapores*, S. D., N. Y., 1953, 113 F. Supp. 93.

4. At the time the assault occurred the plaintiff was a permanent inhabitant of the United States and his stay in America was not transitory.

The fact that such stay may have been technically improper at some point is immaterial in determining whether or not the Jones Act is applicable here. The technical legality of the plaintiff's initial entry into the United States does not preclude him from being considered a "permanent inhabitant" for the purpose of applying the Jones Act and does not require the same application of rules as under strict immigration laws designed to keep undesirable aliens out of this country.

The Court below in this respect stated as follows:

> "• • • the evidence overwhelmingly establishes that Bartholomew had sufficient presence and intent to be deemed a resident and domiciliary of the United States for the purpose of determining whether or not the Jones Act is applicable."

5. This Court has approved the use of the theory of "pendent jurisdiction" in cases where a cause of action is brought under the Jones Act together with a cause of action for unseaworthiness in admiralty even though there is lack of diversity of citizenship.

This Court in the *Romero* case made use of the theory of "pendent jurisdiction". Although this Court in the *Romero* case did not have to decide the exact same question as is present in this case, the question this Court did decide was very close and similar to the one here. In deciding the *Romero* case this Court stated on page 26 of its opinion as follows:

> "These cases can not, we have seen be justified under Section 1331. However, the District Court may have jurisdiction of them 'pendent' to its jurisdiction under the Jones Act."

And further:

> "We perceive no barrier to the exercise of 'pendent jurisdiction' in the very limited circumstances before us."

This question can not be settled in this case in any event unless it is first held that the Jones Act does not apply. Otherwise the same is not directly in issue. Its determination becomes unnecessary and dicta.

This is so because the jury returned a verdict in favor of the plaintiff on both causes of action. Therefore if it is held that the Jones Act applies, then the verdict by the jury on this cause of action was clearly proper and does not fall because an Appellate Court may find that the cause of action for unseaworthiness was improperly submitted to the jury and directs that the same should be tried by the Court sitting in Admiralty.

Once the Court decides that the Jones Act applies there is no need to go any further. As a practical matter the plaintiff is not going to go through the formality of retrying his cause of action for unseaworthiness before the Court alone when he can still recover his judgment against the defendant under the Jones Act even if the question presented here is decided adversely to the plaintiff.

Conclusion

The petition should be denied because no special or important reasons exist for granting certiorari. The decision of the Court below is of limited application due to the unusual facts presented. It involves only the right of this plaintiff to recover under the Jones Act because of the special circumstances present in this particular case.

Respectfully submitted,

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